

# **DOWNEY, BRAND, SEYMOUR, & ROHWER LLP**

## **M E M O R A N D U M**

TO: JOHN DAVIS, BUREAU OF RECLAMATION  
BETTY RILEY SIMPSON, BUREAU OF RECLAMATION

FROM: DAVID E. LINDGREN

DATE: November 30, 2000

RE: **SMUD COMMENTS ON DRAFT CVP M&I SHORTAGE POLICY**

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The following comments are submitted on behalf of the Sacramento Municipal Utility District (SMUD).

At the Bureau of Reclamation's workshop on Tuesday, November 21, you agreed that the M&I contractors would have until November 30 to provide Reclamation with written comments on the November 20, 2000 draft CVP M&I Shortage Policy. As we said in our comment letter dated November 10 on this subject, we believe the policy must be clear and specific and must contain firm commitments by Reclamation as to how it will allocate supplies during shortage periods. Moreover, these commitments must extend to how the policy's basic concepts will be applied (historic use, adjusted for growth, etc.). This is necessary so that a contractor can predict, with reasonable certainty, how the policy will be applied to its particular circumstances.

Keying the allocation of water in times of shortage to historic use is an acceptable concept, but only if historic use is increased (adjusted) for growth due to population increases (i.e., growth in domestic demand) and commercial and industrial growth whether or not associated with population growth. Historic use additionally should be adjusted to take into account weather abnormalities in the year historic use is determined, the effect of a contractor's extraordinary water conservation, and the contractor's use of non-CVP supplies.

It is critically important to SMUD that the policy properly address adjustments for growth. As you know, SMUD has decreased its use of water at Rancho Seco because of the decommissioning of SMUD's nuclear generation facility. This is only an interim reduction, and SMUD fully expects additional generating facilities to be located at Rancho Seco (it is actively engaged in this process now). New facilities will, of course, require significant water supplies. However, it is possible that the historic use determination date could occur *before* SMUD has

installed all the new generation at Rancho Seco. Therefore, it is critical that the policy accommodate demand growth due to future SMUD facilities.

Additionally, we believe that generation of electric power is a public health and safety matter, and we urge that such generation be recognized as being eligible for delivery of health and safety water.

We have reviewed the revisions to the draft CVP M&I Water Shortage Policy submitted by Contra Costa Water District (CCWD) (as contained in Robert Maddow's second e-mail memorandum to you), and we are in general agreement with them. We have several wording suggestions that we believe will render the policy even more clear and make the effect of its application on contractors more predictable.

First, the draft policy uses the term "Historic Use" in two different contexts, one to refer to use in the last unconstrained year, and the other to refer to this historic use as adjusted for growth, etc. The result is lack of clarity and a certain confusion. A few of CCWD's recommended provisions retain this dual usage (see, eg., ¶ 9 of their revision). We believe the policy must clearly differentiate between the concepts of historical use and historical use adjusted for the relevant factors. Some of our comments are directed to this end.

Our comments that follow are keyed to CCWD's recommended revision to the policy as submitted in Robert Maddow's second email memorandum to you.

Page 1, ¶3 (CCWD Comments) - We recommend that the last two sentences of this paragraph be revised to read as follows:

"Therefore, the guarantee of 75% M&I reliability described in the June 9, 1997 CVPIA Administrative Proposal for Urban Water Supply reliability shall be applied to the extent of a contractor's historical use, adjusted for weather, growth, extraordinary water conservation measures, and supplemental supplies, limited however by the M&I contractor's contractual entitlement. Application of these terms will be as provided below in the 'Definition of Terms.'"

Page 3, ¶ # 2 - We recommend that the introductory phrase of the first sentence be revised as follows to clearly distinguish historical use from the adjustments:

"For a M&I contractor to be eligible for a minimum allocation in time of shortage of 75 percent of historical use, adjusted by the relevant factors, the M&I contractor must have . . . ."

Page 3, #3 - Irrigation water converted after September 30, 1994 is eligible for M&I reliability if in 1994 the contractor projected its future delivery as M&I water.<sup>1</sup> Therefore, the second sentence should be begin as follows:

“Subject to the foregoing, irrigation water transferred . . . .”

Page 4, ¶ # 6 - To clearly distinguish historical use from the adjustments, we recommend that the reference to the 75% allocation read as follows:

“. . . . M&I water allocations to contractors may be reduced below 75 percent of historical use, as adjusted, and allocations of M&I water may vary . . . .”

Pages 4 - 5, ¶ 7 - As noted above, we believe electric power generation should qualify for public health and safety water delivery. Therefore, we recommend that the last part of the second sentence read as follows:

“The term public health and safety shall mean . . . and shall include sufficient quantities to meet those needs, as well as essential industrial, institutional, and commercial needs required to ensure public health and safety (*e.g.* hospitals, public services, electric power generation, vital industrial; and commercial needs, water conveyance requirements, *etc.*.”

Page 5, ¶ #8 - To clearly distinguish historical use from the adjustments, we recommend that the first sentence read as follows:

“The term ‘Historical use’ shall mean the water made available to the contractor during the lasat year unaffected by water shortage allocation to the contractor, and shall be adjusted for weather, growth, supplemental supplies, and extraordinary water conservation practices, as defined below.”

Additionally, we are not clear as to the rationale for, or application of, CCWD’s recommended alternative baseline approach. If Reclamation adopts this concept, however, the policy should make clear that the alternative approach applies only of the contractor so elects. Therefore, the beginning of the second sentence should be modified to read as follows:

“In the alternative and at the election of the contractor, adjustment may be accomplished . . . .”

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<sup>1</sup> SMUD takes no position on the September 30, 1994 cutoff date for conversions to qualify for M&I reliability.

We also question whether use of supplemental supplies should not be added to the alternative, since it appears to be a substitute for the four-factor adjustment mechanism in its entirety.

Page 6, ¶9 - As we have said, we believe the policy must commit Reclamation to make adjustments to historical use if certain conditions are met. Neither Reclamation's November 20 draft nor CCWD's revision accomplish this. As we understand it, the growth adjustment is not a "process," but an adjustment (i.e., an increase) that is to be made to a contractor's historical use quantity for purposes of applying the 75% shortage allocation. Therefore, we recommend that this paragraph be revised to read as follows:

“The term ‘adjusted for growth’ shall mean an adjustment made to the contractor’s historical use quantity to take into account increases in demand within the contractor’s service area beyond such historical use, including demand increases attributable to (i) increases in population, and (ii) increases in the number of, or demand of, industrial, commercial, and other entities to whom the contractor serves water, provided that the contractor shall be required to provide reasonable documentation of such increases.

Our recommendation omits any reference to CCWD's alternative baseline proposal only because we require a further explanation of its application. The reference to "capping" the adjustment seems misplaced, since the cap applies to historical use as adjusted by all factors, not just growth. The reference to the contractor's needs analysis should be deleted, as it has no bearing on the shortage policy.

P. 6, ¶ 11 - We repeat the comment made above about including electric power generation in the concept of "public health and safety."

cc: Brian Jobson, SMUD  
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